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HOW TO WIN IN THE COURT OF LAW AND THE COURT OF PUBLIC OPINION AMID A CORPORATE CRISIS

OLIVIA GRIESZMER

I. INTRODUCTION

A crisis is a realized risk that threatens to significantly disturb, damage or destroy an organization's operations, business or reputation.[1] Whether a private or public company, a non-profit or a government agency, every enterprise will face a crisis eventually.[2] When that crisis hits, the company is often immediately thrust into the court of public opinion before it enters a court of law. Crisis management is important from both a legal standpoint and a public relations standpoint. A crisis affects how stakeholders perceive the organization and can lead to reputational damage well before a corporation ever sees its day in court.[3] While most corporate counsel is well equipped to navigate legal crises during litigation, it is imperative to win in the court of public opinion before or during litigation proceedings.[4] Lanny Davis, an attorney, litigator, and former Special Counsel to President Bill Clinton[5] who also recently advised Harvey Weinstein, opined that "It [is] no longer viable for a lawyer to tell a client, 'we'll win it in the courtroom—we won't litigate this in the media.'"[6] It is too easy for the

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[1] Andrew MacDougal et al., *The Board's Role in Crisis Management*, OSLER, HOSKIN & HARCOURT LLP (May 18, 2016), https://www.osler.com/osler/media/Osler/reports/risk-management/Board-of-directors-role-in-crisis-management.pdf; *see generally Id*. at 5.

[2] *Id*.

[3] Friederike Schultza, Sonja Utza & Anja Göritz, *The Medium The Message? Perceptions of and Reactions to Crisis Communication via Twitter, Blogs and Traditional Media*, 37, PUBLIC RELATIONS REVIEW, 21, 21 (2011) http://www.sciencedirect.com/science/article/pii/S0363811110001281.

[4] Andrew M. Apfelberg, Thomas J. Walsh, Jr., *The Court of Public Opinion: Best Practices for Attorneys in High-Profile or Crisis Situations*, AMERICAN BAR ASSOCIATION: BUSINESS LAW TODAY (July, 2014), https://www.americanbar.org/groups/business_law/publications/blt/2014/07/training_tomorrow.html.

[5] Lanny J. Davis to Form New Law Firm Combining Law, Media, Crisis Management and Legislative Strategies for U.S. and International Clients, BUSINESS WIRE (April 19, 2010), http://www.businesswire.com/news/home/20100419006615/en/Lanny-J.-Davis-Form-New-Law-Firm.

[6] Lanny J. Davis, *Why Lawyers Are Best At Crisis Management*, TRIDENT DMG, (last visited Dec 4, 2017).

judge and the jury to be influenced by public opinion, consciously or unconsciously.[7]

Executives often struggle to address both the risk of legal liability and the need to protect the organization's reputation, since mitigating the risk of litigation may be futile if the company loses the public's trust.[8] Therefore, corporate executives often hire crisis managers to assist in the development of a holistic strategy when a crisis breaks or in anticipation of litigation. However, this creates two issues: First, legal advice and strategic communications advice can often be hard to reconcile.[9] Second, attorney-client privilege does not always provide protection for communications involving a third-party such as a public relations firm or a strategic communicator.

Legal advice and communications advice do not always harmoniously coexist due to competing priorities.[10] A strategic communicator is likely to urge transparency from the corporation by suggesting that the corporation admit its wrongdoings and implement corrective measures as soon as possible.[11] This response is more likely to gain forgiveness[12] and rebuild credibility in the public eye, but it is unlikely to come from counsel, as any admission of guilt could be used against the

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[7] *Id*.

[8] Kathy R. Fitzpatrick & Maureen Shubow Rubin*, Public Relations vs. Legal Strategies in Organizational Crisis Decisions*, 21, PUBLIC RELATIONS REVIEW, 21, 23 (1995) http://www.sciencedirect.com/science/article/pii/0363811195900373.

[9] *Id*. at 22.

[10] Alan Watts, *Top 5 Tips: A Lawyer's Perspective on Reputation Management*, HERBERT SMITH FREEHILLS (2016), https://www.herbertsmithfreehills.com/latest-thinking/top-5-tips-a-lawyer%E2%80%99s-perspective-on-reputation-management (last visited Dec 8, 2017).

[11] Fitzpatrick, *supra* note 8, at 22.

[12] Federal Rule of Evidence Rule 407 states "[w]hen, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." States have adopted their own rules regarding subsequent remedial measures but most have rules that are identical or substantially similar to the federal rule. workerscompensation.com, *A Comprehensive Analysis of the Subsequent Remedial Measures Rule and Applicability to the Workers' Compensation Arena*, LEXISNEXIS LEGAL NEWSROOM (June 28, 2010), https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/workers-compensation-law-blog/archive/2010/06/28/a-comprehensive-analysis-of-the-subsequent-remedial-measures-rule-and-applicability-to-the-workers-compensation-arena.aspx?Redirected=true (last visited Dec 25, 2017).

corporation during litigation.[13] An attorney is more likely to play defense in the wake of a crisis by investigating facts thoroughly and deliberately, while urging their client to stay silent.[14] Counsel's gut response wastes time in the face of the ticking clock in the court of public opinion.[15] The ever-famous "no comment" response from a spokesperson at the suggestion of his counsel is no longer satisfactory to the public. A senior public relations manager of Quiznos, David Pendery, opined that, "[a]nytime you decline to comment on a known crisis you'll appear naïve at best, incompetent at worst."[16] The two types of advice can be reconciled with careful rhetoric; it is possible to be held accountable in the public eye without risking legal liability. The key is for corporate executives to *recognize the impact* of the mismanaged situation and *empathize* with those affected. Empathetic statements that recognize the impact of the disaster cannot be used against the corporation or executives in a court of law, as a jury is likely to recognize the empathy as well; however, those statements are conducive to a "win" in the court of public opinion.

Stakeholders and consumers in the marketplace expect and often demand an immediate response from the corporation's spokesperson when a crisis breaks.[17] As of 2016, eighty-three percent of Americans had a social media account, and nearly half of that total were using a social media platform to interact with organizations and corporations.[18] The way that companies communicate with customers online during and after a crisis can have a profound impact on consumers' perception of the organization, the crisis, and the brand.[19] Brand perception is a long-term predictor of corporate success that goes far beyond any one lawsuit or legal dispute.[20]

The time has come to reconcile legal strategy and communications strategy; the link between the two exists in the preservation and improvement of a corporation's reputation.[21] Legal risk now encompasses more than the traditional notion of legality in today's business world, as reputation and monetary impact are now the main vehicles driving legal strategy.[22] General Counsel battle reputational risk while maintaining legal integrity on a minute-by-minute basis; the two are no longer mutually exclusive. A

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[13] Fitzpatrick, *supra* note 8, at 22.
[14] Apfelberg, *supra* note 4.
[15] Fitzpatrick, *supra* note 8, at 22.
[16] W. Timothy Coombs, Ongoing Crisis Communication: Planning, Managing, and Responding, 84 (Matthew Byrnie et al. eds., 4th ed. 2014).
[17] Watts, *supra* note 10.
[18] Chris Britton, *Crisis Communications Best Practices for Managing Social Media*, IN CASE OF CRISIS: CORPORATE CRISIS MANAGEMENT BLOG (May 18, 2017), https://www.rockdovesolutions.com/blog/crisis-communications-best-practices-for-managing-social-media.
[19] *Id*.
[20] Apfelberg, *supra* note 4.
[21] *See* Watts, *supra* note 10.
[22] *Id*.

corporation's board of directors, as well as the market, are concerned with and affected by the company's reputation.[23] Therefore, communication strategy is critical to the vitality of a company in any situation where there's potential legal liability, not only during litigation.

During litigation, opposing counsel is more likely to subpoena the third-party crisis communicator because they have crafted the roadmap to defense.[24] In these situations, attorney-client privilege and the work product doctrine are excellent tools to protect confidential communications between the attorney and her client, the corporation.[25] However, attorneys should not assume that their communications are protected by the attorney-client privilege while collaborating with these communicators.[26] As the doctrine of attorney-client privilege exists now, any non-attorney in the room can risk a complete "subject waiver" of attorney-client privilege—meaning anyone in the room, including attorneys, clients, public relations consultants, crisis management professionals, and strategic communicators could be forced to testify as to the legal advice and provide opposing counsel with all documents related to the advice.[27] This is problematic because crisis situations are typically unexpected, and the chaos involved in such events leaves little time for the planning necessary to maximize the chance that privilege will apply to the flurry of communications between crisis managers and legal counsel.[28]

Though historic, the purpose behind the privilege, to facilitate candid and truthful disclosure of all information from client to attorney, is still important today.[29] During a crisis, those involved must be able to tell their attorney everything they know so the attorney can create and execute the best legal strategy possible. However, now that corporate crises are growing more complex and often involve a team of attorneys, strategic communicators, and crisis managers, the privilege has become easier to waive. While other notes have called for the expansion of the privilege to third-party consultants in crisis communications, this Note will provide tangible advice for how to

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[23] MacDougal et al., *supra* note 1, at 10.
[24] *See* Colleen T. Davies, Lisa M. Baird & Andrew D. Stillufsen, *PR That's Protected*, CORPORATE COUNSEL, 2014, at 1–2.
[25] *Id*.
[26] Meaghan G. Boyd & Sarah T. Babcock, *The Attorney-Client Privilege and Communications Between Counsel and Public-Relations Consultants*, ALSTON & BIRD LLP: FOR YOUNG LAWYERS 6, 8 (2010), https://www.alston.com/-/media/files/insights/publications/2010/11/the-attorneyclient-privilege-and-communications-be/files/boyd_babcock_fyl_article/fileattachment/boyd_babcock_fyl_article.pdf.
[27] Lanny J. Davis, Crisis Tales: Five Rules for Coping with Crises in Business, Politics, and Life, 7 (Simon and Schuster ed., 2014).
[28] *Id*.
[29] The Oh. St. Bar Assoc. Cont. Legal Education Inst., The Oh. St. Bar Assoc., The Attorney Client Privilege and the Work Product Doctrine 1.1, Volume 04-71.

navigate a corporate crisis while maintaining the privilege and keeping the corporation's reputation intact.

Ultimately, it provides a blueprint for corporations to protect the attorney-client privilege in a court of law and to protect the corporation's reputation in the court of public opinion amid a corporate crisis. Part II begins with an overview of history and purpose of both attorney-client privilege and the work product doctrine. Part III covers how and why crisis communicators might benefit from attorney-client privilege and the work product doctrine. Part IV explores the development of attorney-client privilege in the federal and state arenas, including the three patterns of engagement in which courts have extended the privilege to third-party consultants. Part V describes how corporate executives can strategically maneuver business engagements to protect the attorney-client privilege in a court of law. Part VI analyzes a recent corporate crisis and lessons learned from how the corporation fared in the court of public opinion and features an active application of the strategic advice in Part V to a hypothetical corporate crisis.

II. HISTORY AND PURPOSE OF ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

The attorney-client privilege provides societal benefit by encouraging the resolution of disputes by allowing clients to speak truthfully and candidly with their counsel.[30] This benefit comes at a cost, as the privilege enables the concealment of information, thus hindering discovery of the truth.[31] As courts weigh these competing societal interests, they often construe the privilege narrowly.[32]

The work product doctrine exists to encourage attorneys to be thorough and diligent in their note taking and preparation for trial without fear of discovery requests from opposing counsel. In a landmark case concerning the work product doctrine, the Supreme Court noted that without the doctrine, "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.[33] The effect on the legal profession would be demoralizing.[34] And the interests of the clients and the cause of justice would be poorly served."[35] Many scholars have claimed that successful crisis management, from risk assessment in the initial stages to reputation management after the crisis, is

[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] Hickman v. Taylor, 329 U.S. 495, 511, 67 S. Ct. 385, 394, 91 L. Ed. 451 (1947).
[34] *Id*.
[35] *Id*.

dependent on the attorney's ability to gather information and thus, similar policy concerns are at play.[36]

A. Attorney-Client Privilege

The attorney-client privilege is the oldest common law privilege for confidential communications concerning legal advice between an attorney and her client.[37] It is rooted in two related policy concerns. First, effective legal representation requires open and honest communication between the attorney and the client, which hinges on an attorney's reverence to confidentiality.[38] Second, an attorney and her client share a special relationship of trust that unites them as one throughout legal representation.[39] Forcing an attorney to testify against her client would violate the well-established principle that the attorney is her client's legal representative.[40]

The federal attorney-client privilege has developed primarily under common law, as Congress has never codified any federal rules of privilege.[41] In 1975, Congress adopted Rule 501 of the Federal Rules of Evidence not to define privilege, but to guide the development of privilege in the federal court system as common law.[42] The motivation behind common law deferment was Congress' general distrust of privilege after the Watergate scandal in 1972, where President Nixon refused to release incriminating presidential tape recordings by citing executive privilege.[43]

Rule 501 directs federal and state courts to apply state law to a question of privilege in a civil case where state law supplies the rule of decision.[44] Many states have codified their own attorney-client privilege in varying levels of detail; some states merely restate the common law and others, such as Arizona and Texas, include more procedural guidance for the use of the

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[36] Nisha Chandran, The Privilege of PR: Extending the Attorney-Client Privilege to Crisis Communications Consultants, 2015 UNIV. ILLINOIS L. REV. 1288, 1290 (2015).
[37] United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989).
[38] Deborah Jones Merritt & Ric Simmons, Learning Evidence: From the Federal Rules to the Courtroom 835 (3rd ed. 2015).
[39] *Id*.
[40] *Id*.
[41] *Id*. at 836.
[42] *Id*. at 828.
[43] Ann M. Murphy, *Spin Control and the High-Profile Client-Should the Attorney-Client Privilege Extend to Communications with Public Relations Consultants?*, 55 SYRACUSE L. REV. 545, 559 (2005).
[44] Merritt & Simmons, *supra* note 38, at 829.

privilege.[45] In federal courts, if the plaintiff is suing under a federal statute, federal law will apply, as well as in cases of criminal prosecution.[46]

B. Work Product Doctrine

The work product doctrine originated in state common law[47] where courts created their own versions of the doctrine in response to changes imposed on the common law practice of discovery by the Federal Rules of Civil Procedure.[48] The Supreme Court recognized the existence of the work product doctrine for the first time in *Hickman v. Taylor* in 1947.[49] In 1970, the Supreme Court codified the federal work product doctrine, Fed. R. Civ. P. 26(b)(3).[50] One of the most significant features of the current work product doctrine is the coexistence of *Hickman* and Rule 26(b)(3).[51] The rule is narrower than *Hickman* in that it applies only to "tangible" work product; *Hickman* also protects "intangible" work product.[52] Rule 26(b)(3) is broader than *Hickman* in that it protects the work product of non-attorneys, while *Hickman*, on its face, applies only to the work product of attorneys.[53] The doctrine is also codified in Rule 16 of the Federal Rules of Criminal Procedure.[54]

The doctrine boasts a simpler goal than the privilege: to protect the attorney as she prepares for trial.[55] Protection encompasses documents and tangible materials created with or without a lawyer's involvement.[56] Most

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[45] Vincent S. Walkowiak, The attorney-client privilege in civil litigation: protecting and defending confidentiality, 4 (2015).
[46] 28 U.S.C. § 1331.
[47] THE OH. ST. BAR ASSOC. CONT. LEGAL EDUCATION INST., *supra* note 29, at 1.48 (citing Robertson v. Commonwealth, 25 S.E.2d 352 (Va. 1943)).
[48] Jeff A. Anderson, *Work Product Doctrine*, 68 COLUMBIA LAW REVIEW 763–764 (1983), http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4324&context=clr (last visited Jan 3, 2018).
[49] Hickman, *supra* note 33.
[50] The Oh. St. Bar Assoc. Cont. Legal Education Inst., *supra* note 29.
[51] Anderson, *supra* note 48.
[52] *Id*.
[53] *Id*.
[54] Fed. R. Crim. P. 16 (West 2017).
[55] THE OH. ST. BAR ASSOC. CONT. LEGAL EDUCATION INST., *supra* note 29 (citing United States v. Frederick, 182 F.3d 496, 500 (7th Cir. 1999)).
[56] It is wise to have a lawyer involved in the creation of the work product, as some courts do not understand the doctrine and will look for a lawyer's involvement. Additionally, a lawyer's involvement may support an attorney-client privilege claim, may rebut an adversary's claim that the documents were created "in the ordinary course of business" and thus undeserving of protection, and it may help establish the anticipation of litigation. THE OH. ST. BAR ASSOC. CONT. LEGAL EDUCATION INST., *supra* note 29, at 1.49.

courts also allow the protection to apply to intangible information such as deposition testimony or opinions orally proffered by the attorney.[57] The temporal requirement of the doctrine only protects materials created "in connection with" or "in anticipation of" litigation.[58] The motivational requirement of the doctrine mandates that the materials be created "because of" litigation; thus anything created in the "ordinary course of business" will not be protected.[59]

III. USE OF ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE FOR CRISIS COMMUNICATORS

To prevent the defendant from discovering communications and work products created in preparation for or during a corporate crisis, it is worth asserting both the attorney-client privilege and the work product doctrine as both cover oral and written communications pertaining to legal advice between an attorney and her client.[60] However, there are specific benefits to each mode of protection during litigation. Since the work product doctrine does not require an attorney's involvement and can include an attorney's (or third party's) notes and memoranda reflecting legal strategy or any documents created by a lawyer or a third party in anticipation of trial, it is a favorable option for crisis managers seeking protection from subpoena during corporate crises.[61] Despite being less susceptible to waiver, the court can pierce work product protection if need be, thus leaving the crisis manage exposed to the possibility of compelled testimony or subpoena.[62]

Attorney-client privilege boasts impenetrable protection, but can easily be waived if a third-party is exposed to the otherwise privileged communications.[63] However, the attorney-client privilege can apply to communications made at any point in time, as long as an attorney was involved and the communications are about legal advice,[64] while the work product doctrine only protects materials made in anticipation and because of

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[57] *Id*. (citing In re Lorazepam v. Clorazepate Antitrust Litig., MDL Dkt. No. 1290, Misc. No. 99-276 (TFH/JMF), 2001 U.S. Dist. LEXIS 11794, at *14 (D.D.C. July 16, 2001)).
[58] The Oh. St. Bar Assoc. Cont. Legal Education Inst., *supra* note 29 at 1.53.
[59] *Id*. at 1.55.
[60] *Id*. at 1.50.
[61] *Id*.
[62] *Id*.
[63] *Id*. The Oh. St. Bar Assoc. Cont. Legal Education Inst., *supra* note 29.
[64] The attorney must be acting as a legal advisor in situations where attorney-client privilege is asserted. The privilege does not cover communications to or from other attorneys that are acting in other roles, such as communicators, crisis consultants, public relations specialists, etc. It is not enough to be a member of the bar to expect the protection of attorney-client privilege. The attorney must be acting as a legal advisor to their client in order to maintain the privilege. *Id*. at 1.25.

litigation.[65] This means that if the corporation is not currently in litigation, nor anticipating it, the work product doctrine will not provide protection.[66] The privilege is also constantly evolving, as courts continue to expand and restrict the application of attorney-client privilege.

IV. THE DEVELOPMENT OF ATTORNEY-CLIENT PRIVILEGE

Collaboration between corporate counsel and strategic communicators is currently stifled by federal common law surrounding the waiver of attorney-client privilege, and even more so by codified law in certain states. While some courts have found that the attorney-client privilege extends to communications involving strategic communicators and public relations consultants, other courts are increasingly holding that communications between counsel and strategic communicators are not protected by the privilege absent specific circumstances.[67]

A. Federal Judicial Interpretation

An analysis of the evolution of federal common law governing the extension of attorney-client privilege to third-party consultants will provide general counsels, corporate litigators, and corporate executives with a better understanding of the future of the privilege in federal courts.

Throughout this evolution, some courts have conceded that a public relations strategy is an important element in the preparation or presentation of a party's claim or defense in high-profile cases.[68] These courts are therefore willing to expand the attorney-client privilege to encompass the client and its counsel's communications with a third-party consultant that are directed at supporting the client's legal position in the case.[69] Federal common law is broader in its extension of attorney-client privilege to third party consultants in comparison to state law codified in recent years.[70] There are three patterns of engagement in which federal courts have extended the protection of attorney-client privilege to third-party consultants: if the third-party is necessary for effective consultation with emphasis on the policy reasons behind the creation of the privilege, if the third-party is the functional equivalent of an in-house communications department, and if the communications were made for the purpose of obtaining legal advice from the attorney.

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[65] *Id*. at 1.55.
[66] *Id*.
[67] Boyd & Babcock, *supra* note 26, at 6.
[68] Grand Canyon Skywalk Dev. LLC v. Cieslak, No. 2:13-CV-00596-JAD, 2015 WL 4773585, at *9 (D. Nev. Aug. 13, 2015), *aff'd*, No. 215CV00663JADGWF, 2016 WL 890921 (D. Nev. Mar. 7, 2016).
[69] *Id*.
[70] Behunin v. Superior Court, 9 Cal. App. 5th 833, 851, 215 Cal. Rptr. 3d 475, 489 (Ct. App. 2017), *rev. denied* (2017).

1. Necessity and Policy

In the first landmark case governing the extension of the privilege to a third-party consultant, the Second Circuit Court of Appeals focused its analysis on whether the communication in question was made in confidence for the purpose of obtaining legal advice from the attorney.[71] In *Kovel*, communications between the client and an accountant working under the direct supervision of the attorney team were privileged because the court found that an accountant was like a translator: "necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit."[72] The phrase "necessary for effective communication," which is now referred to as the necessity requirement, has prevailed as a standard for maintaining privilege in some federal and state courts since it was employed in *Kovel*.[73]

In 1981, the Supreme Court reviewed the principles underlying the scope of the attorney-client privilege in a corporate context regarding communications between a client's agent and the client's attorney in *Upjohn Co. v. United States*.[74] The Supreme Court rejected a test that only granted privilege if the corporation was seeking the attorney's advice when the privilege communication was made, because that test "overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the *giving of information to the lawyer to enable him to give sound and informed advice*."[75] The holding in *Upjohn*, while limited to communications between the attorney and the client, nods to both the necessity requirement and the policy underlying the privilege; the communication in question must be necessary for the effective consultation between the attorney and her client, and the privilege exists for the purpose of promoting effective communication between the attorney and her client, respectively.

At the turn of the century, the Second Circuit narrowed its decision in *Kovel* by refining the meaning of its "translator" analogy in *U.S. v. Ackert*.[76] That court found that communications between an investment banker and an attorney made for the purpose of providing information to the attorney so that he could better advise his client were not privileged because the communications did not serve to facilitate or translate communications

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[71] United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961).
[72] *Id*.
[73] See *Bousamra v. Excela Health*, 2017 PA Super 235 (July 19, 2017); Behunin v. Superior Court, 9 Cal. App. 5th 833, 837 (Ct. App. 2017), *rev. denied* (June 14, 2017).
[74] Upjohn Co. v. United States, 449 U.S. 383, 384, 101 S. Ct. 677, 680, 66 L. Ed. 2d 584 (1981).
[75] *Id*. (emphasis added).
[76] United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999).

with the client, like a translator would.[77] Rather, the attorney sought out the investment banker for information that the company did not have about the transaction and its tax consequences.[78] This distinction can be best summed up by the assertion that the third-party consultant must be *interpreting* client communications in order to preserve the protection of the privilege. Providing the attorney with information that she did not already have, like an educator, does not maintain the privilege.[79]

2. Functional Equivalence

In 2003, and despite the Second Circuit's holding in *Ackert*, the U.S. District Court for the Southern District of New York used the holdings in *Kovel* and *Upjohn* to expand the application of attorney-client privilege even further under a new test: the functional equivalence test.[80] The factually-detailed inquiry allows for the extension of attorney-client privilege to third-party consultants acting at the behest of a client or the attorney.[81] The test is satisfied, and thus the privilege is upheld, when: (1) the consultant had primary responsibility for a key corporate job, (2) there existed a continuous, close-working relationship between the consultant and the company's principals on matters critical to the company's position in the litigation, and (3) the consultant was likely to possess information that no one else in the company had.[82]

The functional equivalent inquiry for a third-party consultant was used in the Second Circuit case, *In re Copper Market Antitrust Litigation*, where a corporation retained a crisis management firm to handle public relations matters in anticipation of litigation arising from a corporate scandal.[83] In a fact-based analysis, the district court held that the PR firm was the functional equivalent of an in-house public relations department with respect to media relations for several reasons:[84] the PR firm had the authority to make decisions on behalf of the company concerning its public relations strategy,[85] the firm worked out of the company's headquarters and was essentially incorporated into the company's staff to perform a corporate function.[86] The PR consultants regularly conferred with the client's litigation counsel to prepare materials that incorporated the attorney's advice, and

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[77] *Id*.
[78] *Id*. at 138.
[79] *Id*. at 140.
[80] In re Copper Mkt. Antitrust Litig., 200 F.R.D. 213, 218 (S.D.N.Y. 2001).
[81] Lee H. Rosenthal, David F. Levi & John K. Rabiej, Federal Civil Procedure Manual 505 (2015).
[82] *Id*.
[83] *In re* Copper Mkt. Antitrust Litig., 200 F.R.D. at 215.
[84] *Id*. at 216.
[85] *Id*.
[86] *Id.* at 219.

acted as the company's agent and spokesperson throughout the extent of the scandal.[87]

The district court concluded, "applying the principles set forth by the Supreme Court in *Upjohn,* there is no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice."[88] The emphasis on communications made for the purpose of obtaining legal advice from the attorney continues to be a staple in the court's analysis of privileged communications exposed to a third-party consultant.

3. Legal Advice

In another case arising from the Southern District of New York, *In re Grand Jury Subpoenas*, the government subpoenaed a public relations firm that was hired by the target of a grand jury investigation to neutralize the media environment that was filled with unbalanced media reports about the target which created a risk that prosecutors and regulators would feel public pressure[89] to bring charges.[90] In affirming the extension of the privilege, the District Court relied on the Second Circuit's assertion in *Kovel*: "What is vital to the privilege is that the communications be made in confidence for the purpose of obtaining legal advice from the lawyer."[91] The court in *In re Grand Jury Subpoenas* held "that (1) confidential communications (2) between lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege."[92] The court stated that the privilege does not apply if the

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[87] *Id*. at 216.
[88] *Id.* at 219; *see also In re* Grand Jury Subpoenas Dated January 20, 1998, 995 F. Supp. 332, 340 (E.D.N.Y. 1998), citing *In re* Bieter Co., 16 F. 3d 929 (8th Cir. 1994).
[89] Note the influence of the court of public opinion on the business decision to hire a public relations firm so as to win in the court of public opinion and the court of law. *In re* Grand Jury Subpoenas Dated Mar. 24, 2003 Directed to (A) Grand Jury Witness Firm & (B) Grand Jury Witness, 265 F. Supp. 2d 321, 323 (S.D.N.Y. 2003).
[90] *Id*. at 326.
[91] The court in *Kovel* elaborated by stating that if the client is only seeking non-legal advice, such as accounting advice, or if a third-party's advice is sought rather than the attorney's, no privilege exists. *In re Grand Jury Subpoenas,* 265 F.Supp.2d at 325, quoting *Kovel,* 296 F.2d at 922, citing Olender v. United States, 210 F.2d 795, 805-806 (9th Cir. 1954) and Reisman v. Caplin, 61-2 U.S. T.C. ¶ 9673 (1961).
[92] In re Grand Jury Subpoenas, 265 F.Supp.2d at 331.

client, rather than the attorney, directly hires the public relations firm.[93] However, if the elements of the test are met, the privilege extends to communications between the lawyer and the public relations consultant as well as between the client and the public relations firm.[94]

To offer support for the affirmation of privilege, the court explained that protecting such communications from disclosure would support one of the purposes of the attorney-client privilege-- the administration of justice:

> the Court is well aware that the media, prosecutors, and law enforcement personnel in cases like this often engage in activities that color public opinion, ... in the most extreme cases, to the detriment of his or her ability to obtain a fair trial.... Thus, in some circumstances, the advocacy of a client's case in the public forum will be important to the client's ability to achieve a fair and just result in pending or threatened litigation.[95]

The court's observation of the dichotomy between the court of public opinion and the court of law in reference to the extension of privilege is a progressive one. Unfortunately for attorneys seeking to use the progressive extension of attorney-client privilege created in *In re Grand Jury Subpoenas*, several courts have declined to adopt the holding because the case is so factually unique, and thus limited by its context; it was a criminal proceeding in a narrow scenario of public relations consultants assisting lawyers during a high profile grand jury investigation.[96]

In *Calvin Klein Trademark Trust v. Wachner,* an earlier decision that is factually-similar to *In re Grand Jury Subpoenas*, the District Court for the Southern District of New York reached the opposite conclusion on whether the privilege applies.[97] In rejecting the application of the privilege, the court

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[93] *Id*. at 326 The importance of who retains the third-party consultant is unclear, as courts are not uniform in weighing this factor. In 2001, the District Court for the Southern District of New York granted privilege where the client retained the PR firm. See generally *In re Copper Market Antitrust Litigation*. However, in 2003, the same court expressly noted that if the target of litigation had directly hired the PR firm, as opposed to her attorneys, the client's communications with the PR firm would not have been privileged. *See In re Grand Jury Subpoenas*, 265 F.Supp.2d at 326.

[94] *In re Grand Jury Subpoenas*, 265 F. Supp.2d at 329.

[95] *Id*. at 330.

[96] *See* Ravenell v. Avis Budget Grp., Inc., 2012 WL 1150450, at *3 (E.D.N.Y. Apr. 5, 2012) and *In re* Chevron Corp., 749 F.Supp.2d 170, 184 (S.D.N.Y.)

[97] Calvin Klein Trademark Tr. v. Wachner, 198 F.R.D. 53, 54 (S.D.N.Y. 2000). In *Calvin Klein*, the public relations consultant was hired to assist the lawyers in understanding the possible reaction of the plaintiff's various constituencies to the

found that few, if any, of the communications were made for the purpose of obtaining legal advice; the PR firm was merely providing ordinary public relations advice, which does not warrant the privilege.[98] The court's finding of a dearth of legal advice in the communications in *Calvin Klein* makes the case distinguishable from *In re Grand Jury Subpoenas* where the privilege was upheld because the communications were made for the purpose of obtaining legal advice.[99]

Although it is almost impossible to pin down specific facts that must exist to secure the extension of attorney-client privilege to third-party consultants[100] in federal courts, the overarching themes of these cases provide some guidance to general counsels looking to collaborate with a third-party consultant amid a corporate crisis. First, the third-party should be necessary for the effective consultation between the client and the attorney, because that is what the privilege is designed to facilitate.[101] Second, the third-party consultant or firm should be so engrained in the operations of the corporation that it operates as a functional equivalent of an in-house public relations department.[102] Lastly, and arguably most important, the communications must be made in confidence for the purpose of obtaining legal advice from the lawyer.[103] Communications that are meant to educate the lawyer, or communications that include mere public relations or media advice with no legal ties, are unlikely to be protected by an extension of attorney-client privilege.[104] Further, it is not enough that the communications come from a consultant that has earned a juris doctorate; a licensed lawyer providing mere PR advice will not enjoy the protection of attorney-client privilege just because she is a lawyer.[105]

B. State Codification Attorney-Client Privilege

Common law governing the extension of attorney-client privilege to third-party consultants is limited, somewhat inconsistent, and almost completely confined to one circuit, apart from a few recent decisions. These inconsistencies pose a problem for general counsels and corporate litigators

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litigation, rendering legal advice, and ensuring that media interest in the action would be dealt with responsibly.

[98] *Id*.

[99] *In re Grand Jury Subpoenas*, 265 F. Supp.2d at 332.

[100] *Chandran*, *supra* note 36, at 1299.

[101] *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

[102] See generally *In re Copper Mkt. Antitrust Litig.,* 200 F.R.D. 213 (S.D.N.Y. 2001).

[103] United States v. Kovel, 296 F.2d at 922.

[104] *See Calvin Klein*, 198 F.R.D. at 54;*Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, No. 02 CIV.7955 DLC, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003).

[105] *Haugh*, 2003 WL 21998674 at *3.

seeking to integrate a PR firm or third-party consultant into their litigation strategy, while avoiding a waiver of the privilege during a corporate crisis.

In response to the inconsistent extension and denial of attorney-client privilege in the federal arena, states are expanding or narrowing the privilege via the codification of their own statutes and judicial interpretation. Counsel should refer to their local state codes to discern how privilege is applied in their jurisdiction. However, the three states examined in this Part will cover the waterfront of attorney-client privilege analyses at the state level.

1. New York

Under New York common law, the extension of attorney-client privilege to a third-party is framed as an "agency" exception to the waiver existing under federal common law.[106] The exception is applicable where "communications [are] made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communication."[107] The party asserting the agency exception must show: "(1) ... a reasonable expectation of confidentiality under the circumstances, and (2) [that] disclosure to the third party was *necessary* for the client to obtain informed legal advice."[108]

The "necessity" element is inspired by the test created in *Kovel* [the third-party must be "necessary, or at least highly useful, for the effective consultation between the client"], but is stricter in application.[109] "[T]he 'necessity' element means more than just useful and convenient, but rather requires that the involvement of the third party be *nearly indispensable* or serve some specialized purpose in facilitating the attorney-client communications."[110] "Where the third party's presence is merely useful but not necessary, the privilege is lost."[111]

In *Egiazaryan v. Zalmayev*, the plaintiff's assertion of attorney-client privilege protecting his interactions with the PR firm, whom he considered to be his "agents," was denied because he failed to show that the PR firm was "nearly indispensable" to his legal strategy.[112] Egiazaryan proffered evidence that the public relations firm actively participated in the legal strategy and advice sessions with the attorney, but the court retorted that the mere fact that it was a part of the legal decision-making process does not explain why the firm's involvement was necessary to facilitate communications between

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[106] *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 430 (S.D.N.Y. 2013).
[107] *Id*.
[108] *Id*. at 431. (emphasis added).
[109] *Id*.
[110] *Id*. (emphasis added).
[111] *Egiazaryan,* 290 F.R.D. at 431.
[112] *Id*.

himself and his counsel, as in the case of a translator or an accountant clarifying communications between an attorney and client.[113]

2. California

The State of California has codified the attorney-client privilege, and employs a "reasonably necessary" test to determine if a communication is protected.[114] The code mandates that communications between a client and her lawyer must be made "to further the interest of the client in the consultation" or they must be made to someone "to whom disclosure is *reasonably necessary* for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."[115]

In its first case regarding the waiver of attorney-client privilege via disclosure of communications to a PR firm, a California appellate court held that the attorney-client privilege did not protect communications among a client, an attorney and a public relations firm that was retained to create a website to induce the opposing parties to settle a lawsuit because the disclosure was not a "reasonably necessary" part of the process of the client obtaining legal advice from his attorney.[116] The court opined that to allow the privilege to cover all communications regarding the effort to settle the lawsuit would extend the privilege too far.[117] In support of this position, the court cited the relevant policy concern of preventing the admission of relevant and otherwise admissible evidence as a reason to narrowly construe the privilege.[118]

3. Pennsylvania

The Commonwealth of Pennsylvania codified the attorney-client privilege in 1978, and it has since been expanded through judicial interpretation.[119] To invoke the attorney-client privilege, the holder of the privilege must be a client; the person who the communication was made to must be an attorney; the communication must relate to a fact of which the attorney was informed by his client for the purpose of securing either an

[113] *Id*.
[114] CAL. EVID. CODE § 952 (West 2003).
[115] *Id*. (emphasis added).
[116] Behunin, 9 Cal. App. 5th at 846.
[117] William Jordan, 42 PROF'L LIAB. REPORTER NL 9, no. 4, 2017. at 3.
[118] Behunin, 9 Cal. App. 5th at 849-850.
[119] 42 Pa. Stat. and Cons. Stat. Ann. § 5928 (West 2018).

opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.[120]

In 2015, the Superior Court of Pennsylvania essentially adopted the *Upjohn* test and expanded the attorney-client privilege to include the board of directors, the officers, or other agents of a corporation as a part of the corporation for purposes of application of the attorney-client privilege in *Yocabet*,[121] and then to managers, officers, and directors of a corporation in *Red Vision.*[122] The court also observed that the attorney-client privilege applies to a corporation differently than to an individual.[123]

In *Bousamra v. Excela*, Excela asked the court to use the reasoning in *Kovel* to expand the privilege to a third party hired by a corporation to facilitate legal advice rendered by a lawyer.[124] Ultimately, the court determined that *Kovel* did not apply because the communication from Excela's General Counsel to the PR consultant was not made to gain the PR firm's assistance in providing legal advice to the company.[125]

The court therefore declined to address whether the attorney-client privilege in Pennsylvania should be expanded to encompass outside agents of the client under the reasoning used in *Kovel*, and held that Excela waived the attorney-client privilege via the functional equivalence analysis.[126] The court found that the PR firm was "not the functional equivalent of Excela's employee nor did it function as Excela's in-house public relations

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[120] Bousamra, 167 A.3d at 735 (citing Red Vision Sys., Inc. v. Nat'l Real Estate Info. Servs., L.P., 108 A.3d 54, 63 (Pa.Super. 2015)).

[121] "A corporation is a creature of legal fiction, which can act or 'speak' only through its officers, directors, or other agents. Where a representative for a corporation acts within the scope of his or her employment or agency, the representative and the corporation are one and the same entity, and the acts performed are binding on the corporate principal. Thus, the board of directors of a corporation, in addition to its officers, can act on its behalf for purposes of application of the attorney-client privilege." *Yocabet v. UPMC Presbyterian*, 119 A.3d 1012, 1028 (2015) *citing Petrina v. Allied Glove Corp.*, 46 A3d 795, 799 (Pa.Super.2012).

[122] "The administration of the attorney-client privilege in the case of corporations presents special problems. As an inanimate entity, a corporation must act through agents." *Red Vision Sys., Inc*., 108 A.3d at 60. Thus, "[a] corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation," which includes managers, officers, and directors. Id..

[123] Bousamra, 167 A.3d at 736.

[124] *Id*.

[125] *Id*. at 737.

[126] *Id*.

department."[127] The PR firm was an independent business entity that had clients nationwide, and was hired by Excela sporadically to handle specific projects such as the maintenance of the company's reputation after a corporate crisis.[128] In sum, neither the test used in *Kovel* nor the functional equivalence test were satisfied in *Bousamra*, although one analyzes the specific communication in question and the other analyzes the PR firm's collaboration with the company, respectively.

V. PROTECTING THE PRIVILEGE IN THE COURT OF LAW

It is well established that the case law surrounding attorney-client privilege is inconsistent regarding third-party consultants in both the federal and state arenas. These inconsistencies lead to uncertainties for general counsels and corporate litigators as they prepare to collaborate with a third-party consultant such as a PR firm. This Part will provide a framework for how to develop best practices to mitigate the uncertainty surrounding a court's analysis on the extension of attorney-client privilege to third-party consultants amidst a corporate crisis.

A. Selecting and Retaining a Crisis Communications Firm

In Anticipation of Litigation: The crisis communications firm should be retained in anticipation of litigation, but after the crisis has occurred.[129] This approach provides dual protection. First, it disputes that argument that the firm was hired to provide every day PR work, which courts have consistently held is not enough to extend the privilege.[130] Second, the work product doctrine will protect documents or communications prepared in anticipation of litigation if the attorney-client privilege is inadvertently waived.

New Firm: Avoid retaining the firm that the company regularly uses for public relations matters. Courts have expressly noted that pre-existing consulting relationships do not support a finding that the PR firm was necessary for effective consultation between the client and the attorney.[131] If

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[127] *Id* at 742.
[128] Bousamra, 167 A.3d at 742.
[129] Davies et al., *supra* note 24, at 2.
[130] *Egiazaryan v. Zalmayev*, 290 F.R.D. at 43 (stating that while some attorneys may feel it is desirable at times to conduct a media campaign, that does not transform their coordination of a campaign into legal advice) (quoting *Haugh v. Schroder Investment Management. Inc.*, 2003 WL 21998674, at *3, which states "that '[a] media campaign is not a litigation strategy[,]")..
[131] Chandran, *supra* note 36, at 1302 (stating "[i]n *LG Electronics v. Whirlpool Corp*., the court denied privilege to Whirlpool's communications with its PR firms, specifically noting that the outside agencies [have] long-term relationships based

the company must continue with the same media firm for crisis-related work that they use for everyday work, both sides should take steps to keep the interactions separate and the crisis-related work confidential.[132] Firms should consider creating a separate working team specifically for legal crisis management to differentiate between every day PR work and this specific matter, and keep all documents and employees separate.[133]

Engagement Letter. Draft a new engagement letter for the specific services that the PR firm will provide to facilitate consultation between the client and the attorney; including an explanation of how the services are necessary for the provision of legal advice from the attorney to the client.[134] The engagement letter should specify that the PR firm is working directly under counsel and reporting directly to the law firm.[135] Specify that all documents, work products, and communications between the PR firm and counsel shall be confidential and made solely for the purpose of assisting counsel in providing legal advice to the client.[136]

B. Communications and Work Product

All Communications Involve Counsel. All communications between the consultant and counsel, and the client and the consultant, must be for the *purpose* of the client obtaining legal advice from the attorney.[137] A general step toward satisfying this requirement is to involve counsel in every single communication. The client should *never* engage with the third-party consultant without the attorney involved and present. Communications should also be executed verbally as often as possible, as opposed to in-writing.

Strategic Communications Advice in Tandem with Legal Advice. To avoid opposing counsel's retort that the advice is merely public relations advice, the burden of proof is on the attorney to prove that his engagement with the third-party is for the purpose of providing legal advice

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on Whirlpool's ordinary business dealings and thus do not implicate the same concerns as PR firms retained for the purpose of responding to litigation.")..

[132] Davies et al., *supra* note 24, at 2.

[133] *Id*.

[134] *Id*.

[135] Michael F. Buchanan & Angela B. Redai, *The Privilege of PR: Application of the Attorney-Client Privilege to Crisis Communications and Public Relations in Breach Response Planning*, DATA SECURITY LAW BLOG (Jan. 11, 2017), https://www.pbwt.com/data-security-law-blog/the-privilege-of-pr-application-of-the-attorney-client-privilege-to-crisis-communications-and-public-relations-in-breach-response-planning.

[136] *Id*.

[137] *Id*.

to the client.[138] If media strategy can be demonstrated to be part of that legal advice, for example, advice to correct mis-reporting or distortions that could influence the jury pool or provide some other link to legal advice, then the privilege will be upheld.[139] The legal crisis management from the strategic communications consultant must be "materially different from those that any ordinary public relations firm would have performed."[140] If not, then a court will dismiss the legal degree of the crisis communicator as irrelevant and is likely to deny attorney-client privilege.[141]

Confidentiality. Counsel and the firm should prepare and follow a strict protocol regarding the confidentiality of documents produced in anticipation of litigation that includes: Heavy involvement from counsel in drafting documents and communicating with the media firm; Mark privileged communications as "privileged and confidential" and "subject to attorney-client privilege" or "work product privilege" as applicable; and instruct recipients of all documents to refrain from dissemination.[142]

Communications during a crisis are always fast-paced, therefore, a corporate counsel's proactive attention to these tips can make all the difference in preserving privilege at a later date, should litigation arise.[143] The preservation of privilege is paramount during a crisis because if the privilege is waived, all of the corporation's mistakes, blunders, missteps, and potentially incriminating evidence can be revealed.

VI. THE COURT OF PUBLIC OPINION

"PR" no longer stands for "public relations," it now stands for "protect reputation."[144] Reputation is a part of the social capital of the brand, and is representative of a form of social credit upon which a corporation can rely and build.[145] In the event of a crisis, a good reputation also helps an organization enjoy the benefit of the doubt, which buys time to address the issue before investors, employees, customers, regulators and the media form their own opinions.[146] "Organizations that fail to manage their own mistakes effectively often pay the price in negative publicity and [reputational

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[138] Davis, *supra* note 6.
[139] *Id*.
[140] *Calvin Klein Trademark Tr. v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000).
[141] Davis, *supra* note 6.
[142] Davies et al., *supra* note 24, at 2.
[143] *Id*.
[144] Jennifer Risi, *Strategic Communications Defines Corporate Reputation* OGILVY.COM (June 8, 2015), https://www.ogilvy.com/topics/topics-pr/strategic-communications-defines-corporate-reputation/.
[145] *Id*.
[146] MacDougal et al., *supra* note 1, at 4.

damage]."[147] The extent of damage to the organization's reputation, financial health, or continued viability is often subject to variable factors including the level of media attention, stakeholder and community interest, and the initial response from company leaders.[148] Despite the variability of the circumstances, there are common threads of crisis management that can be identified in organizations that have been successful in the court of public opinion.[149] The survival of a reputation in the court of public opinion requires three elements: (1) a timely response that directly addresses the issue and its impact, (2) cognizance of the fact that words matter, and (3) empathy. This Part will include an illustrative analysis of a well-known, recent crisis to highlight the severe impact a crisis can have when best practices are not followed.

A. Harvey Weinstein

On October 5, 2017, a New York Times investigation by Jodi Kantor and Megan Twohey revealed dozens of sexual harassment allegations against Harvey Weinstein dating back thirty years.[150] The same day, Weinstein issued what crisis PR expert Richard Levick called "one of the worst written apologies I've ever seen in a crisis situation."[151] In the weeks following, more women came forward with accusations of sexual assault and harassment against Weinstein, including Gwyneth Paltrow and Angelina Jolie.[152] This ignited the flame behind the #MeToo movement on social media of women sharing their personal stories of sexual harassment to illustrate the pervasive nature of sexual harassment across all industries.[153] In the same week, Lanny Davis, the former special counsel to President Bill Clinton, resigned as crisis manager for Weinstein, along with other members of the crisis team Weinstein had assembled on October 4th in anticipation of the breaking news

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[147] Bart Shachnow, *Admitting Your Mistakes is a Crucial Step in Crisis Management*, ZURICH INSURANCE (May 8, 2017), https://www.zurichna.com/en/knowledge/articles/2017/05/admitting-your-mistakes-is-crucial-step-in-crisis-management.

[148] MacDougal et al., *supra* note 1, at 3.

[149] *Id*.

[150] Daniel Victor, *How the Harvey Weinstein Story Has Unfolded*, N.Y. TIMES (Oct. 18, 2017), https://www.nytimes.com/2017/10/18/business/harvey-weinstein.html.

[151] Gene Maddaus, *Harvey Weinstein's Crisis Response 'One of the Worst' Experts Have Seen*, VARIETY (Oct. 6, 2017), http://variety.com/2017/biz/news/harvey-weinstein-scandal-crisis-response-worst-1202582850/.

[152] Victor, *supra* note 150.

[153] Samantha Schmidt, *#MeToo: Harvey Weinstein Case Moves Thousands to Tell their Own stories of Abuse, Break Silence,* THE WASHINGTON POST (Oct. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/?noredirect=on&utm_term=.466d77e13592.

stories.[154] Following the disintegration of his original crisis team, Weinstein hired Sitrick and Company, a crisis management firm known for taking on tough celebrity clients who are under fire in the media.[155]

Harvey Weinstein's legacy as a Hollywood mogul completely unraveled in a matter of days. Although timely, his poor public apology in the form of a statement hardly addressed the impact of his actions and lacked empathy. According to PR experts, the Weinstein's statement further exacerbated his scandal because he refused to grapple with the severity of the situation.[156]

B. The Weinstein Company

The Weinstein Company (TWC), a multimedia production and distribution company founded in 2005 by Bob and Harvey Weinstein, suffered greatly at the hands of Harvey's sexual harassment scandal. The Weinstein name, which was once met with praise and respect as the brothers have 341 Oscar nominations and have won 81 Academy Awards between them,[157] has been irreparably tarnished by this scandal, and further exacerbated by poor public responses from both the company and Harvey himself.

The scandal spun out of control in a matter of hours. One day after the New York Times expose was published, Ketchum Films ended its production and distribution deal with The Weinstein Company.[158] TWC's top spokesperson, Nicole Quenqua, announced she will no longer speak on behalf of the company.[159] In just a week, *The Wall Street Journal* reported potential buyers were circling the sinking Weinstein Company.[160] The Weinstein Company was then forced to weigh the possibility of selling all or part of it business to potential buyers, which were few and far between.[161]

The Board's decision to claim ignorance of Harvey's actions over thirty years implies that they were asleep at the wheel of the company at best,

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[154] Associated Press, *The Latest: Weinstein Co. Denies Knowledge of Allegations*, DAILY MAIL ONLINE (Oct. 10, 2017), http://www.dailymail.co.uk/wires/ap/article-4967552/The-Latest-Damon-says-Weinstein-allegations-sickening.html.
[155] Sean Czarnecki, *Timeline of a Crisis: Harvey Weinstein's Downfall*, PR WEEK (Oct. 23, 2017), https://www.prweek.com/article/1448094/timeline-crisis-harvey-weinsteins-downfall#jsFFgQfCvqZAQH2q.99.
[156] Maddaus, *supra* note 151.
[157] The Weinstein Company, *About the Weinstein Company*, THE WEINSTEIN COMPANY, http://weinsteinco.com/about-us/ (last visited Dec 16, 2017).
[158] Czarnecki, *supra* note 155.
[159] *Id*.
[160] *Id*.
[161] *Id*.

or had knowledge of Harvey's illegal behavior and chose to look the other way, which is even worse.[162] One-third of the board resigned after the scandal was published.[163] Experts are predicting that the Weinstein brand is unsalvageable, which encompasses both Harvey's Hollywood legacy and the company's reputation as a major player in film.[164] Harvey Weinstein has lost miserably in the court of public opinion, and he took his corporation down with him. This loss may also spell trouble for both Harvey and TWC in a court of law, as a judge and the jury may already be influenced by public opinion, consciously or unconsciously.

C. Analysis

Harvey Weinstein, The Weinstein Company, and the Board of Directors are all facing risk of litigation as a result of this scandal. The Weinstein Company was under an investigation lead by New York Attorney General Eric Schneiderman for civil rights violations;[165] and if the Board knew about the pattern of sexual harassment by Weinstein but failed to take action, it may have breached its fiduciary duty.[166] The Weinstein Company has been subpoenaed by the New York Attorney General's civil rights bureau, seeking "all documents, records, and correspondence related to all complaints, whether formal or informal, relating to sexual harassment or other discrimination on the basis of gender or age, against any employee or management employee[,]" as well as "information on how complaints were handled, whether a formal investigation was initiated, and records related to settlements or other dispositions."[167] The investigation into whether officials at the company violated state civil rights law or New York City's human rights law reflects how the Weinstein scandal has shifted into broader questions of who was aware of the allegations before they were made public in The New York Times and other news publications.[168]

To see how the best practices detailed in Part V might play out in a crisis scenario, imagine the Weinstein Company's attorneys have hired a crisis communications firm in response to the subpoenas. Understand that the board and other corporate executives should disclose everything they knew and be clear about what they did not know, as well as any actions taken or

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[162] Andrew Blum, *Does PR Have a Role in a Weinstein-Type Situation?*, PR NEWS (Oct. 16, 2017), http://www.prnewsonline.com/what-pr-can-or-cant-do-in-a-weinstein-type-situation/.
[163] *Id*.
[164] *Id*.
[165] Czarnecki, *supra* note 155.
[166] Ted Johnson, *New York Attorney General Launches Investigation Into Weinstein Co.*, VARIETY (Oct. 23, 2017), http://variety.com/2017/biz/news/new-york-attorney-general-weinstein-co-investigation-1202596608/.
[167] *Id.*
[168] *Id.*

inaction on their part, to their attorney(s), because this is what the privilege is designed to facilitate. The attorney must know the entire truth to develop the best legal strategy possible.[169] TWC is off to a good start because the crisis firm was hired by the attorneys, and not TWC itself, in anticipation of litigation. The temporal aspect of the retainer will satisfy the test for the work product doctrine. Next, TWC's attorneys should be an outside law firm, not in-house attorneys at TWC. Attorney-client privilege is clearer and more consistently applied to outside counsel compared to in-house counsel, where the privilege is much more nuanced.[170] TWC should also hire a new business for the crisis, rather than TWC's regular PR firm, to rebut any speculation that the advice provided by the crisis firm is ordinary public relations advice that TWC receives on an as-needed basis. The company wants to build a case to support the argument that this crisis is a special circumstance, not an everyday PR blunder. The engagement letter between the crisis firm and TWC's attorneys should specify that the crisis firm is solely working for the attorneys, and the retention of the crisis firm is necessary for the execution of legal advice to the TWC board. All communications made by the crisis firm should be to facilitate legal advice from the attorneys to TWC; the crisis consultants should never provide legal advice to TWC, even if they are licensed attorneys, as this would risk a waiver of the privilege. Additionally, all communications should be verbalized rather than documented where possible, to protect the interests of the client (TWC) in the event of additional subpoenas or depositions. For communications that must be documented, and all tangible work products, the crisis firm and the attorneys should follow strict confidentiality protocol, as detailed in Part V.

VII. CONCLUSION

The purpose of the privilege, as articulated in *Upjohn*, "to encourage full and frank communications between attorneys and their client and thereby promote a broader public interest in the observance of the law and the administration of justice," is still incredibly relevant to the privilege as it exists today.[171] However, the world in which the privilege is used has changed. Today, corporations are more structurally and operationally complex; social interactions are made more complex by social media and the ease of connectivity between people, and in turn, crises are made more complex. Crises are no longer handled by one or two executives in a board room. Now there is an entire war room of attorneys, crisis managers, strategic communicators, spokespersons, media consultants, and others helping to navigate a crisis that could quickly destroy an entire corporation permanently. While some may argue that the privilege must be expanded to

[169] MERRITT & SIMMONS, *supra* note 38, at 835.
[170] Bass, Berry & Sims, *Attorney/Client Privilege for In-house Counsel*, ASSOCIATION OF CORPORATE COUNSEL p. 2 (2011), http://www.acc.com/legalresources/quickcounsel/acpfihc.cfm.
[171] Upjohn, 449 U.S. at 389.

match the evolution of the world it is used in, it is helpful to have tangible advice to help corporations and their counsel navigate the complex corporate crises in the interim. A corporation can stay ahead of a crisis by directly and empathetically responding to the incident and those impacted by it with tangible ways to remedy the issue. This makes the corporation more susceptible to a win in the court of public opinion. Next, if a crisis firm is retained to assist with the management of the crisis in the press or in the courtroom, several precautionary steps must be taken to make sure that the information shared between all parties remains privileged. The preservation of the privilege will prevent all the potentially damning information shared by the client, and all the legal strategies created by the attorney from being discoverable by the opposing counsel. Proactivity and deliberate actions made by the corporation to follow these steps will make it easier to secure a win in the court of public opinion and the court of law, thus keeping its reputation intact amid a corporate crisis.